

**BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA**

APPLICATION TO CHANGE WATER A) RIGHT NO. 40A 30152397 BY CAVAN) FARMING PROPERTIES, LLC)	PRELIMINARY DETERMINATION TO GRANT CHANGE
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On June 1, 2021, Cavan Farming Properties, LLC (Applicant) submitted Application to Change Water Right No. 40A 30152397 to change Groundwater Certificate No. 40A 44832 to the Department of Natural Resources and Conservation (Department or DNRC). The Department published receipt of the Application on its website. The Department requested additional information from the Applicant on August 13, 2021. The Applicant responded by submitting information to the Department received on November 3, 2021. The Application was determined to be correct and complete as of November 10, 2021. An Environmental Assessment for this Application was completed on November 23, 2021.

INFORMATION

The Department considered the following information submitted by the Applicant, which is contained in the administrative record.

Application as filed

- Application to Change a Water Right, Form 606 Stock Tank
- Attachment with narrative addressing the application details and statutory criteria.
- Map showing well, pipelines and stock tanks
- General Abstract for Groundwater Certificate No. 40A 44832

Information Received after Application Filed or Generated by the Department during the Application Process

- Department Memorandum–Historical Stock Use Clarification, dated June 2, 2021

- Well Log Report
- Map of well, pipelines, and stock tanks, submitted by Russell Bradley, September 9, 2021 (map submitted as one component of Applicant's deficiency response)
- Email communication exchange between the Department and Applicant's attorney: September 9, 2021.
- Applicant's deficiency response received November 3, 2021.
- Department Memorandum—Flow Rate, dated December 3, 2021.
- Correction of Water Right Record form (40A 44832-00) received December 6, 2021 correcting point of diversion and place of use.

Information within the Department's Possession/Knowledge

- Water right records including, but not limited to, File for Groundwater Certificate No. 40A 44832

The Department has fully reviewed and considered the evidence and argument submitted in this Application and preliminarily determines the following pursuant to the Montana Water Use Act (Title 85, chapter 2, part 3, part 4, MCA).

WATER RIGHT TO BE CHANGED

FINDINGS OF FACT

1. Applicant seeks authorization to change Groundwater Certificate No. 40A 44832.¹ The project is in Wheatland County about 2.5 miles west of Judith Gap, Montana. Following is a table of the existing elements of Groundwater Certificate No. 40A 44832:

TABLE 1 – GROUNDWATER CERTIFICATE NO. 40A 44832

WR Number	Purpose	Source	*Flow Rate/Vol	Period of Diversion / Period of Use	Point of Diversion (POD)	Place of Use (POU)	Priority Date
40A 44832	Stock	Ground-water	50 GPM 1.81 AF	Jan 1 – Dec 31	NENESE Sec 34, T11N, R15E	NENESE Sec 34, T11N, R15E	April 15, 1982

*GPM = gallons per minute; AF = acre-feet.

CHANGE PROPOSAL

FINDINGS OF FACT

2. Applicant seeks to change Groundwater Certificate No. 40A 44832 by adding nine places of use (stock tanks) to an existing well via a series of pipelines.² The proposed additional stock tanks are in the following locations:

- S2SENE Section 34, T11N, R15E (1 tank)
- N2NESE Section 34, T11N, R15E (1 tank)
- SWSWNW Section 35, T11N, R15E (1 tank)
- NWNWSW Section 35, T11N, R15E (1 tank)
- SWSWSW Section 35, T11N, R15E (1 tank)
- SWSWNW Section 2, T10N, R15E (1 tank)
- NWSWSW Section 2, T10N, R15E (1 tank)

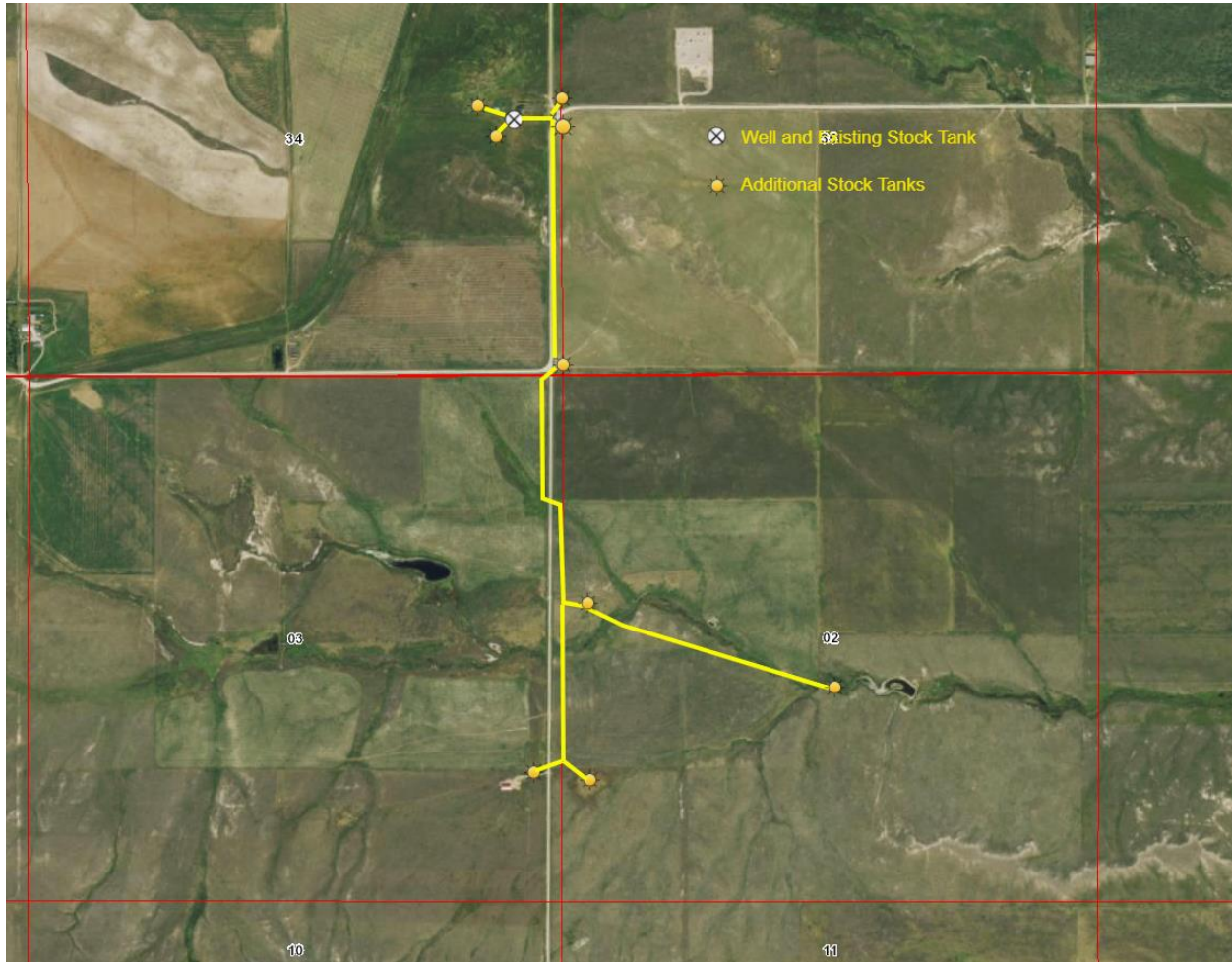
¹ The Applicants submitted a Correction of Water Right Record form to the Department on December 6, 2021. The form clarified the actual locations of the well original stock tank. The Department processed the form, corrected the point of diversion and place of use legal land descriptions from NESENE to NENESE Sec 34, and reissued the Certificate.

² The existing water right, Groundwater Certificate No. 40A 44832, was authorized in 1982 for one place of use, a stock tank located within the same 10-acre legal land description as the groundwater well. The proposed change includes adding nine stock tanks to the stock watering system, for a total of 10 stock tanks (one existing tank and nine proposed tanks).

- NWNWSE Section 2, T10N, R15E (1 tank)
- NESESE Section 3, T10N, R15E (1 tank)

The developed depth of the groundwater well is 129 feet.³ Water will be supplied to the stock tanks at a flow rate of 10 gallons per minute (GPM), based on the capacity of the well pump.

Following is a map showing the well location, proposed stock tanks, and pipelines.



³ According to the Change Application, the well is estimated to be about 120 feet deep. The water right Notice filed in 1982 asserts the well was drilled by Joe Pirrie (driller from Shawmut, MT), and the Notice explicitly states that there was "No Well Log" available. However, a search of the Montana Groundwater Information Center (GWIC) records identifies a well within the same section (Section 34), drilled by Mr. Pirrie to a depth of 129 feet. The well log shows the well as being drilled in 1973, which is two years prior to the date identified in the 1982 water right Notice for putting the water to beneficial use (the Notice shows a date of beneficial use of 1975). According to the Applicant's deficiency response, received by the Department on November 3, 2021, there is only one well on property owned by Cavan Farming Properties, LLC, within Section 34. Therefore, it is likely and presumed the well log represents the same well involved in this change proceeding. A copy of the well log is included in the file.

CHANGE CRITERIA

3. The Department is authorized to approve a change if the applicant meets its burden to prove the applicable § 85-2-402, MCA, criteria by a preponderance of the evidence. Matter of Royston, 249 Mont. 425, 429, 816 P.2d 1054, 1057 (1991); Hohenlohe v. DNRC, 2010 MT 203, ¶¶ 33, 35, and 75, 357 Mont. 438, 240 P.3d 628 (an applicant's burden to prove change criteria by a preponderance of evidence is "more probably than not."); Town of Manhattan v. DNRC, 2012 MT 81, ¶8, 364 Mont. 450, 276 P.3d 920. Under this Preliminary Determination, the relevant change criteria in §85-2-402(2), MCA, are:

(2) Except as provided in subsections (4) through (6), (15), (16), and (18) and, if applicable, subject to subsection (17), the department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence that the following criteria are met:

(a) The proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued under part 3.

(b) The proposed means of diversion, construction, and operation of the appropriation works are adequate, except for: (i) a change in appropriation right for instream flow pursuant to 85-2-320 or 85-2-436; (ii) a temporary change in appropriation right for instream flow pursuant to 85-2-408; or (iii) a change in appropriation right pursuant to 85-2-420 for mitigation or marketing for mitigation.

(c) The proposed use of water is a beneficial use.

(d) The applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use or, if the proposed change involves a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water. This subsection (2)(d) does not apply to: (i) a change in appropriation right for instream flow pursuant to 85-2-320 or 85-2-436; (ii) a temporary change in appropriation right for instream flow pursuant to 85-2-408; or (iii) a change in appropriation right pursuant to 85-2-420 for mitigation or marketing for mitigation.

4. The evaluation of a proposed change in appropriation does not adjudicate the underlying right(s). The Department's change process only addresses the water right holder's ability to make a different use of that existing right. *E.g., Hohenlohe*, at ¶¶ 29-31; *Town of Manhattan*, at ¶8; *In the Matter of Application to Change Appropriation Water Right No.41F-31227 by T-L Irrigation Company* (DNRC Final Order 1991).

HISTORIC USE AND ADVERSE EFFECT

FINDINGS OF FACT - Historic Use

5. The water right proposed for change is Groundwater Certificate No. 40A 44832. The historic purpose of use is stock, and the means of diversion is a well drilled to a depth of 129 feet. The point of diversion is in the NENESE Section 34, T11N, R15E. The place of use consists of a stock tank within the same legal land description. Application; Well Log Report.

6. The legal land descriptions for the existing point of diversion (well) and place of use (stock tank) for 40A 44832 that were issued on the original Certificate were incorrect. The point of diversion and place of use are in the NENESE Section 34, not the NESENE Section 34. Applicant's maps and deficiency response. A correction was submitted to the Department on December 6, 2021 to correct the point of diversion and place of use legal land descriptions to the NENESE Section 34. The groundwater certificate was reissued on December 13, 2021.

7. *Priority Date* – The priority date of a new appropriation is the date the application is received by the Department. The application (Notice of Completion of Groundwater Development or Notice) was received in the Lewistown Regional Office on April 15, 1982. Therefore, the priority date is April 15, 1982. File for 40A 44832.

8. *Flow Rate and Volume* - The amount of water authorized under the water right to be changed (40A 44832) is a flow rate of 50 GPM and volume of 1.81 AF. The Notice filed in 1982 asserted a flow rate of 50 GPM. File for 40A 44832. The Notice was required to be filed within 60 days *after* water was put to beneficial use, therefore the form should reflect actual usage.

9. The diverted volume authorized under the water right, 1.81 AF, was based on a maximum number of livestock served of 120 cattle and one horse (121.5 animal units). File for 40A 44832. There was no question on the 1982 Notice to identify volume, and the Department presumably authorized volume based on a standard rate for the ascribed number of animal units. In this instance, the per-capita animal water usage calculates at 13.3 gallons per day. The Department's modern day standard rate is 15.0 gallons per day per animal unit, therefore the volume authorized in 1982 is slightly less than the modern standard. There is no evidence in the file to suggest how volume was calculated or whether the 1982 standard was different than today's standard. The Department cannot make an historic use finding for volume that exceeds that authorized, so the volume determined to be historically used in this proceeding shall be 1.81 AF.

10. The means and point of diversion consist of a groundwater well in the NENESE Section 34, T11N, R15E. The place of use is adjacent to the well in the same 10-acre legal land description and consists of a stock water tank placed in a set of corrals. Water is supplied for Stock purposes year-round. File for 40A 44832; Application.

11. The Department finds the following historic use:

WR #	Priority Date	Flow Rate	Diverted/ Consumed Volume	Point of Diversion	Place of Use	Period of Use
40A 44832	Apr 15, 1982	50 GPM	1.81 AF	NENESE Sec 34, T11N, R15E	NENESE Sec 34, T11N, R15E	Jan 1 through Dec 31

FINDINGS OF FACT – *Adverse Effect*

12. The historical volume used under Groundwater Certificate No. 40A 44832 is 1.81 AF, for stock watering of 121.5 AUs from January 1 to December 31. The same number of animal units will utilize the Applicant's pastures and access the water under the proposed change, therefore there will be no increase in volume used. File for 40A 44832; Department Memorandum–Historical Stock Use Clarification, dated June 2, 2021.

13. The flow rate to be diverted from the groundwater well is 10 GPM, based on pump capacity. The flow rate is less than that historically used (50 GPM). Application; File for 40A 44832.

14. The Department finds there will be no adverse effects from the proposed change.

BENEFICIAL USE

FINDINGS OF FACT

15. The existing water right is for stock use which is a recognized beneficial use under statute. §85-2-102(4), MCA.

16. After authorization of the proposed change, stock will access 10 water tanks placed within a place of use consisting of four sections. Application. By adding the stock tanks the Applicant will be able to manage its grazing practices more efficiently.

17. The volume of 1.81 AF was authorized in 1982 under 40A 44832 and amounts to 13.3 gallons per day per animal unit. The per-capita usage is slightly less than the modern-day standard used by the Department for stock watering (15 gallons per day per animal unit). The flow rate of 10 GPM is based on the capacity of the well pump. File for 40A 44832; Application.

18. The Department finds that a flow rate of 10 GPM and volume of 1.81 AF are beneficial uses.

ADEQUATE DIVERSION

FINDINGS OF FACT

19. The diversion works consists of a groundwater well drilled to a depth of 129 feet. The well was drilled in 1973 by a Montana licensed water well contractor, Joseph Pirrie. The stock watering system was designed by the USDA Natural Resources and Conservation Services Harlowton Field Office. The well is equipped with a 220-volt, 3/4 horsepower submersible pump. The pump capacity is 10 GPM. 1.5-inch PVC pipe

supplies 10 stock water tanks. Hydrants and floats are installed on each stock tank to shut off and control appropriations. Application; Applicant's deficiency response.

20. The Department finds the means of diversion is adequate for diverting the requested amount.

POSSESSORY INTEREST

FINDINGS OF FACT

21. The Applicant signed the affidavit on the application form affirming it has possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. Robert H. Cavan, Jr. signed the application and is a representative of Cavan Farming Properties, LLC. Application; Applicant's deficiency response.

CONCLUSIONS OF LAW

HISTORIC USE AND ADVERSE EFFECT

22. Montana's change statute codifies the fundamental principles of the Prior Appropriation Doctrine. Sections 85-2-401 and -402(1)(a), MCA, authorize changes to existing water rights, permits, and water reservations subject to the fundamental tenet of Montana water law that one may change only that to which he or she has the right based upon beneficial use. A change to an existing water right may not expand the consumptive use of the underlying right or remove the well-established limit of the appropriator's right to water actually taken and beneficially used. An increase in consumptive use constitutes a new appropriation and is subject to the new water use permit requirements of the MWUA. McDonald v. State, 220 Mont. 519, 530, 722 P.2d 598, 605 (1986)(beneficial use constitutes the basis, measure, and limit of a water right); Featherman v. Hennessy, 43 Mont. 310, 316-17, 115 P. 983, 986 (1911)(increased consumption associated with expanded use of underlying right amounted to new appropriation rather than change in use); Quigley v. McIntosh, 110 Mont. 495, 103 P.2d 1067, 1072-74 (1940)(appropriator

may not expand a water right through the guise of a change – expanded use constitutes a new use with a new priority date junior to intervening water uses); Allen v. Petrick, 69 Mont. 373, 222 P. 451(1924)(“quantity of water which may be claimed lawfully under a prior appropriation is limited to that quantity within the amount claimed which the appropriator has needed, and which within a reasonable time he has actually and economically applied to a beneficial use. . . . it may be said that the principle of beneficial use is the one of paramount importance . . . The appropriator does not own the water. He has a right of ownership in its use only”); Town of Manhattan, at ¶ 10 (an appropriator’s right only attaches to the amount of water actually taken and beneficially applied); Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, Pg. 9 (2011)(the rule that one may change only that to which it has a right is a fundamental tenet of Montana water law and imperative to MWUA change provisions); In the Matter of Application to Change a Water Right No. 41I 30002512 by Brewer Land Co, LLC, DNRC Proposal For Decision and Final Order (2004).⁴

23. Sections 85-2-401(1) and -402(2)(a), MCA, codify the prior appropriation principles that Montana appropriators have a vested right to maintain surface and ground water conditions substantially as they existed at the time of their appropriation; subsequent appropriators may insist that prior appropriators confine their use to what was actually appropriated or necessary for their originally intended purpose of use; and, an appropriator may not change or alter its use in a manner that adversely affects another water user. Spokane Ranch & Water Co. v. Beatty, 37 Mont. 342, 96 P. 727, 731 (1908); Quigley, 110 Mont. at 505-11, 103 P.2d at 1072-74; Matter of Royston, 249 Mont. at 429,

⁴ DNRC decisions are available at:
http://www.dnrc.mt.gov/wrd/water_rts/hearing_info/hearing_orders/hearingorders.asp

816 P.2d at 1057; Hohenlohe, at ¶¶43-45.⁵

24. The cornerstone of evaluating potential adverse effect to other appropriators is the determination of the “historic use” of the water right being changed. Town of Manhattan, at ¶10 (recognizing that the Department’s obligation to ensure that change will not adversely affect other water rights requires analysis of the actual historic amount, pattern, and means of water use). A change applicant must prove the extent and pattern of use for the underlying right proposed for change through evidence of the historic diverted amount, consumed amount, place of use, pattern of use, and return flow because a statement of claim, permit, or decree may not include the beneficial use information necessary to evaluate the amount of water available for change or potential for adverse effect.⁶ A comparative analysis of the historic use of the water right to the proposed change in use is necessary to prove the change will not result in expansion of the original right, or adversely affect water users who are entitled to rely upon maintenance of conditions on the source of supply for their water rights. Quigley, 103 P.2d at 1072-75 (it is necessary to ascertain historic use of a decreed water right to determine whether a change in use expands the underlying right to the detriment of other water user because a decree only provides a limited description of the right); Royston, 249 Mont. at 431-32, 816 P.2d at 1059-60 (record could not sustain a conclusion of no adverse effect because the applicant failed to provide the Department with evidence of the historic diverted volume, consumption, and return flow); Hohenlohe, at ¶44-45; Town of Manhattan v. DNRC, Cause No. DV-09-872C, Montana Eighteenth Judicial District Court, *Order Re Petition for Judicial Review*, Pgs. 11-12 (proof of historic use is required even when the

⁵ See also Holmstrom Land Co., Inc., v. Newlan Creek Water District, 185 Mont. 409, 605 P.2d 1060 (1979); Lokowich v. Helena, 46 Mont. 575, 129 P. 1063(1913); Thompson v. Harvey, 164 Mont. 133, 519 P.2d 963 (1974)(plaintiff could not change his diversion to a point upstream of the defendants because of the injury resulting to the defendants); McIntosh v. Graveley, 159 Mont. 72, 495 P.2d 186 (1972)(appropriator was entitled to move his point of diversion downstream, so long as he installed measuring devices to ensure that he took no more than would have been available at his original point of diversion); Head v. Hale, 38 Mont. 302, 100 P. 222 (1909)(successors of the appropriator of water appropriated for placer mining purposes cannot so change its use as to deprive lower appropriators of their rights, already acquired, in the use of it for irrigating purposes); and, Gassert v. Noyes, 18 Mont. 216, 44 P. 959(1896)(change in place of use was unlawful where reduced the amount of water in the source of supply available which was subject to plaintiff’s subsequent right).

⁶A claim only constitutes *prima facie* evidence for the purposes of the adjudication under § 85-2-221, MCA. The claim does not constitute *prima facie* evidence of historical use in a change proceeding under §85-2-402, MCA. For example, most water rights decreed for irrigation are not decreed with a volume and provide limited evidence of actual historic beneficial use. §85-2-234, MCA

right has been decreed because the decreed flow rate or volume establishes the maximum appropriation that may be diverted, and may exceed the historical pattern of use, amount diverted or amount consumed through actual use); Matter of Application For Beneficial Water Use Permit By City of Bozeman, *Memorandum*, Pgs. 8-22 (Adopted by DNRC *Final Order* January 9, 1985)(evidence of historic use must be compared to the proposed change in use to give effect to the implied limitations read into every decreed right that an appropriator has no right to expand his appropriation or change his use to the detriment of juniors).⁷

25. An applicant must also analyze the extent to which a proposed change may alter historic return flows for purposes of establishing that the proposed change will not result in adverse effect. The requisite return flow analysis reflects the fundamental tenant of Montana water law that once water leaves the control of the original appropriator, the original appropriator has no right to its use and the water is subject to appropriation by others. E.g., Hohenlohe, at ¶144; Rock Creek Ditch & Flume Co. v. Miller, 93 Mont. 248, 17 P.2d 1074, 1077 (1933); Newton v. Weiler, 87 Mont. 164, 286 P. 133(1930); Popham v. Holloron, 84 Mont. 442, 275 P. 1099, 1102 (1929); Galiger v. McNulty, 80 Mont. 339, 260 P. 401 (1927); Head v. Hale, 38 Mont. 302, 100 P. 222 (1909); Spokane Ranch &

⁷ Other western states likewise rely upon the doctrine of historic use as a critical component in evaluating changes in appropriation rights for expansion and adverse effect: Pueblo West Metropolitan District v. Southeastern Colorado Water Conservancy District, 717 P.2d 955, 959 (Colo. 1986)(“[O]nce an appropriator exercises his or her privilege to change a water right ... the appropriator runs a real risk of requantification of the water right based on actual historical consumptive use. In such a change proceeding a junior water right ... which had been strictly administered throughout its existence would, in all probability, be reduced to a lesser quantity because of the relatively limited actual historic use of the right.”); Santa Fe Trail Ranches Property Owners Ass'n v. Simpson, 990 P.2d 46, 55 -57 (Colo., 1999); Farmers Reservoir and Irr. Co. v. City of Golden, 44 P.3d 241, 245 (Colo. 2002)(“We [Colorado Supreme Court] have stated time and again that the need for security and predictability in the prior appropriation system dictates that holders of vested water rights are entitled to the continuation of stream conditions as they existed at the time they first made their appropriation); Application for Water Rights in Rio Grande County, 53 P.3d 1165, 1170 (Colo. 2002); Wyo. Stat. § 41-3-104 (When an owner of a water right wishes to change a water right ... he shall file a petition requesting permission to make such a change The change ... may be allowed provided that the quantity of water transferred ... shall not exceed the amount of water historically diverted under the existing use, nor increase the historic rate of diversion under the existing use, nor increase the historic amount consumptively used under the existing use, nor decrease the historic amount of return flow, nor in any manner injure other existing lawful appropriators.); Basin Elec. Power Co-op. v. State Bd. of Control, 578 P.2d 557, 564 -566 (Wyo, 1978) (a water right holder may not effect a change of use transferring more water than he had historically consumptively used; regardless of the lack of injury to other appropriators, the amount of water historically diverted under the existing use, the historic rate of diversion under the existing use, the historic amount consumptively used under the existing use, and the historic amount of return flow must be considered.)

Water Co., 37 Mont. at 351-52, 96 P. at 731; Hidden Hollow Ranch v. Fields, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185; In the Matter of Application for Change Authorization No. G (W)028708-411 by Hedrich/Straugh/Ringer, DNRC Final Order (Dec. 13, 1991); In the Matter of Application for Change Authorization No. G(W)008323-G761 By Starkel/Koester, DNRC Final Order (Apr. 1, 1992); In the Matter of Application to Change a Water Right No. 41I 30002512 by Brewer Land Co, LLC, DNRC Proposal For Decision and Final Order (2004); Admin. R.M. 36.12.101(56)(Return flow - that part of a diverted flow which is not consumed by the appropriator and returns underground to its original source or another source of water - is not part of a water right and is subject to appropriation by subsequent water users).⁸

26. Although the level of analysis may vary, analysis of the extent to which a proposed change may alter the amount, location, or timing return flows is critical in order to prove that the proposed change will not adversely affect other appropriators who rely on those return flows as part of the source of supply for their water rights. Royston, 249 Mont. at 431, 816 P.2d at 1059-60; Hohenlohe, at ¶¶ 45-6 and 55-6; Spokane Ranch & Water Co., 37 Mont. at 351-52, 96 P. at 731. Noted Montana Water Law scholar Al Stone explained that the water right holder who seeks to change a water right is unlikely to receive the full amount claimed or historically used at the original place of use due to reliance upon return flows by other water users. Montana Water Law, Albert W. Stone, Pgs. 112-17 (State Bar of Montana 1994).

27. In Royston, the Montana Supreme Court confirmed that an applicant is required to prove lack of adverse effect through comparison of the proposed change to the historic use, historic consumption, and historic return flows of the original right. 249 Mont. at 431, 816 P.2d at 1059-60. More recently, the Montana Supreme Court explained the relationship between the fundamental principles of historic beneficial use, return flow, and the rights of subsequent appropriators as they relate to the adverse effect analysis in a

⁸ The Montana Supreme Court recently recognized the fundamental nature of return flows to Montana's water sources in addressing whether the Mitchell Slough was a perennial flowing stream, given the large amount of irrigation return flow which feeds the stream. The Court acknowledged that the Mitchell's flows are fed by irrigation return flows available for appropriation. Bitterroot River Protective Ass'n, Inc. v. Bitterroot Conservation Dist. 2008 MT 377, ¶¶ 22, 31, 43, 346 Mont. 508, ¶¶ 22, 31, 43, 198 P.3d 219, ¶¶ 22, 31, 43(citing Hidden Hollow Ranch v. Fields, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185).

change proceeding in the following manner:

The question of adverse effect under §§ 85-2-402(2) and -408(3), MCA, implicates return flows. A change in the amount of return flow, or to the hydrogeologic pattern of return flow, has the potential to affect adversely downstream water rights. There consequently exists an inextricable link between the “amount historically consumed” and the water that re-enters the stream as return flow. . . .

An appropriator historically has been entitled to the greatest quantity of water he can put to use. The requirement that the use be both beneficial and reasonable, however, proscribes this tenet. This limitation springs from a fundamental tenet of western water law—that an appropriator has a right only to that amount of water historically put to beneficial use—developed in concert with the rationale that each subsequent appropriator “is entitled to have the water flow in the same manner as when he located,” and the appropriator may insist that prior appropriators do not affect adversely his rights.

This fundamental rule of Montana water law has dictated the Department’s determinations in numerous prior change proceedings. The Department claims that historic consumptive use, as quantified in part by return flow analysis, represents a key element of proving historic beneficial use.

We do not dispute this interrelationship between historic consumptive use, return flow, and the amount of water to which an appropriator is entitled as limited by his past beneficial use.

Hohenlohe, at ¶¶ 42-45 (internal citations omitted).

28. The Department’s rules reflect the above fundamental principles of Montana water law and are designed to itemize the type evidence and analysis required for an applicant to meet its burden of proof. Admin.R.M. 36.12.1901 through 1903. These rules forth specific evidence and analysis required to establish the parameters of historic use of the water right being changed. Admin.R.M. 36.12.1901 and 1902. The rules also outline the analysis required to establish a lack of adverse effect based upon a comparison of historic use of the water rights being changed to the proposed use under the changed conditions along with evaluation of the potential impacts of the change on other water users caused by changes in the amount, timing, or location of historic diversions and return flows. Admin.R.M. 36.12.1901 and 1903.

29. Applicant seeks to change existing water rights represented by its Water Right Claims. The “existing water rights” in this case are those as they existed prior to July 1,

1973, because with limited exception, no changes could have been made to those rights after that date without the Department's approval. Analysis of adverse effect in a change to an "existing water right" requires evaluation of what the water right looked like and how it was exercised prior to July 1, 1973. In McDonald v. State, the Montana Supreme Court explained:

The foregoing cases and many others serve to illustrate that what is preserved to owners of appropriated or decreed water rights by the provision of the 1972 Constitution is what the law has always contemplated in this state as the extent of a water right: such amount of water as, by pattern of use and means of use, the owners or their predecessors put to beneficial use. . . . the Water Use Act contemplates that all water rights, regardless of prior statements or claims as to amount, must nevertheless, to be recognized, pass the test of historical, unabandoned beneficial use. . . . To that extent only the 1972 constitutional recognition of water rights is effective and will be sustained.

220 Mont. at 529, 722 P.2d at 604; see also Matter of Clark Fork River Drainage Area, 254 Mont. 11, 17, 833 P.2d 1120 (1992).

30. Based upon the Applicant's evidence, the Applicant has proven by a preponderance of the evidence the historic use of Groundwater Certificate No. 40A 44832 for a flow rate of 50 GPM and 1.81 AF in diverted/consumed volume. (FOF Nos. 5-11)

31. Based upon the Applicant's comparative analysis of historic water use and water use under the proposed change, the Applicant has proven that the proposed change in appropriation right will not adversely affect the use of the existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued. §85-2-402(2)(b), MCA. (FOF Nos. 12-14)

BENEFICIAL USE

32. A change applicant must prove by a preponderance of the evidence the proposed use is a beneficial use. §85-2-102(4) and -402(2)(c), MCA. Beneficial use is and has always been the hallmark of a valid Montana water right: "[T]he amount actually needed for beneficial use within the appropriation will be the basis, measure, and the limit of all

water rights in Montana . . .” McDonald, 220 Mont. at 532, 722 P.2d at 606. The analysis of the beneficial use criterion is the same for change authorizations under §85-2-402, MCA, and new beneficial permits under §85-2-311, MCA. Admin.R.M. 36.12.1801. The amount of water that may be authorized for change is limited to the amount of water necessary to sustain the beneficial use. E.g., Bitterroot River Protective Association v. Siebel, *Order on Petition for Judicial Review*, Cause No. BDV-2002-519, Montana First Judicial District Court (2003) (*affirmed on other grounds*, 2005 MT 60, 326 Mont. 241, 108 P.3d 518); Worden v. Alexander, 108 Mont. 208, 90 P.2d 160 (1939); Allen v. Petrick, 69 Mont. 373, 222 P. 451(1924); Sitz Ranch v. DNRC, DV-10-13390, Montana Fifth Judicial District Court, *Order Affirming DNRC Decision*, Pg. 3 (2011)(citing BRPA v. Siebel, 2005 MT 60, and rejecting applicant’s argument that it be allowed to appropriate 800 acre-feet when a typical year would require 200-300 acre-feet); Toohey v. Campbell, 24 Mont. 13, 60 P. 396 (1900)(“The policy of the law is to prevent a person from acquiring exclusive control of a stream, or any part thereof, not for present and actual beneficial use, but for mere future speculative profit or advantage, without regard to existing or contemplated beneficial uses. He is restricted in the amount that he can appropriate to the quantity needed for such beneficial purposes.”); §85-2-312(1)(a), MCA (DNRC is statutorily prohibited from issuing a permit for more water than can be beneficially used).

33. Applicant proposes to use water for stock use which is a recognized beneficial use. §85-2-102(4), MCA. Applicant has proven by a preponderance of the evidence stock use is a beneficial use and that 10 GPM up to 1.81 AF in volume is the amount needed to sustain the beneficial use. §85-2-402(2)(c), MCA (FOF Nos. 15-18)

ADEQUATE MEANS OF DIVERSION

34. Pursuant to §85-2-402 (2)(b), MCA, the Applicant must prove by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate. This codifies the prior appropriation principle that the means of diversion must be reasonably effective for the contemplated use and may not result in a waste of the resource. Crowley v. 6th Judicial District Court, 108 Mont. 89, 88

P.2d 23 (1939); In the Matter of Application for Beneficial Water Use Permit No. 41C-11339900 by Three Creeks Ranch of Wyoming LLC (DNRC Final Order 2002)(information needed to prove that proposed means of diversion, construction, and operation of the appropriation works are adequate varies based upon project complexity; design by licensed engineer adequate).

35. Pursuant to §85-2-402 (2)(b), MCA, applicant has proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate for the proposed beneficial use. (FOF Nos. 19-20)

POSSESSORY INTEREST

36. Pursuant to §85-2-402(2)(d), MCA, the Applicant must prove by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. See also ARM 36.12.1802.

37. The Applicant has proven by a preponderance of the evidence that it has possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. (FOF No. 21)

PRELIMINARY DETERMINATION

Subject to the terms and analysis in this Preliminary Determination Order, the Department preliminarily determines that Application to Change Water Right No. 40A 30152397 should be granted subject to the following.

The Applicant may add nine places of use (stock tanks) in the following legal land descriptions:

- S2SENE Section 34, T11N, R15E (1 tank)
- N2NESE Section 34, T11N, R15E (1 tank)
- SWSWNW Section 35, T11N, R15E (1 tank)
- NWNWSW Section 35, T11N, R15E (1 tank)

- SWSWSW Section 35, T11N, R15E (1 tank)
- SWSWNW Section 2, T10N, R15E (1 tank)
- NWSWSW Section 2, T10N, R15E (1 tank)
- NWNWSE Section 2, T10N, R15E (1 tank)
- NESESE Section 3, T10N, R15E (1 tank)

The Applicant is authorized to continue use of its existing point of diversion and place of use in the NENESE Section 34, T11N, R15E. The period of diversion and use is January 1 through December 31. The flow rate is 10 GPM and the volume is 1.81 AF per annum for stock use.

NOTICE

This Department will provide public notice of this Application and the Department's Preliminary Determination to Grant pursuant to §85-2-307, MCA. The Department will set a deadline for objections to this Application pursuant to §§85-2-307, and -308, MCA. If this Application receives a valid objection, it will proceed to a contested case proceeding pursuant to Title 2 Chapter 4 Part 6, MCA, and §85-2-309, MCA. If this Application receives no valid objection or all valid objections are unconditionally withdrawn, the Department will grant this Application as herein approved. If this Application receives a valid objection(s) and the valid objection(s) are conditionally withdrawn, the Department will consider the proposed condition(s) and grant the Application with such conditions as the Department decides necessary to satisfy the applicable criteria. E.g., §§85-2-310, -312, MCA.

DATED this 14th day of December, 2021.

/Original signed by Scott Irvin/
 Scott Irvin, Regional Manager
 Lewistown Water Resource Regional Office
 Department of Natural Resources and Conservation

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 14th day of December, 2021, by first class United States mail.

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